YEW CHENG LIM

v.

REGAL MARKETING & TRADING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[CIVIL APPEAL NO: R3-12B-263-2010]
17 AUGUST 2010

CONTRACT: *Employment contract - Breach - Whether appellant misrepresented to respondent - Whether respondent had lawfully repudiated employment contract - Whether respondent entitled to a refund of payments made to appellant during his employment*

CONTRACT: *Rescission - Restitutio in integrum - Whether applicable - Whether respondent had lawfully repudiated employment contract - Whether respondent entitled to a refund of payments made to appellant during his employment - Whether payments would have been made if respondent knew of appellant's misrepresentation - Whether there was merit in appellant's contention*

EVIDENCE: *Documentary evidence - Admissibility - Evidence Act 1950, s. 73A - Whether letter from university admissible - Whether courts had wide discretionary power to admit letter - Whether maker should be called as witness - Whether testimony of maker commensurate to time and expenses incurred - Whether appellant had produced documents to rebut respondent's allegations*

LABOUR LAW: *Employment - Contract of employment - Whether appellant misrepresented to respondent - Whether respondent had lawfully repudiated employment contract - Whether respondent entitled to a refund of payments made to appellant during his employment - Whether there was merit in appellant's contention*

This was an appeal from the decision of the Sessions Court, where the respondent had filed an action for breach of contract and claimed for a refund of payments made to the appellant as the senior general manager of the respondent. The respondent claimed that appellant had misrepresented himself by producing a degree from the University of Hull that was forged. In support of its claim, a letter from the university confirming the same was adduced as evidence. The Sessions Court held in favour of the respondent; hence this appeal. The appellant contended that the letter was not admissible under s. 73A Evidence Act 1950 ('the Act') and the maker should be called to testify. Furthermore he contended

A that the respondent's claim for a refund was not maintainable under the principle of *restitutio in integrum*, as it would require the respondent to restore the services rendered to it during his employment which was not possible.

B **Held (dismissing the appeal with costs):**

(1) The court had a wide discretionary power under s. 73A of the Act to admit the letter, even in the absence of evidence from the respondent that the conditions were met. The case was such where the witness was overseas and it would have caused delay and incurred high costs to bring her to court just to confirm that the MBA degree was not genuine. The evidence to be given by her would probably be very short and would not be commensurate with the time and expenses incurred to bring her to Malaysia. Furthermore, the appellant could have easily rebutted the respondent's allegation with the production of the original documents, which he did not do. The letter from the university was therefore admissible as the conditions under s. 73A of the Act were satisfied. (para 13)

(2) Since it was the appellant who had misrepresented and induced the respondent to enter into the contract of employment, the contract becomes voidable at the option of the respondent. The appellant had wrongfully received the monetary benefits from the respondent who had lawfully repudiated the contract. The respondent would not have made the payments to the appellant if it had known of the misrepresentation earlier. The principle of *restitutio in integrum* does not apply in this case and thus there was no merit in the appellant's contention. (para 17)

(3) There was no error of law or fact in the learned trial judge's decision. The learned trial judge had correctly identified the issues and had applied the correct law. There was no justification to interfere with her decision. (para 18)

Case(s) referred to:

Allied Bank (Malaysia) Sdn Bhd v. Yau Jiok Hua [2006] 3 CLJ 27 CA ***(refd)***

Jong Set Fah v. Asia Life Assurance Society Ltd [1996] 2 CLJ 667 HC ***(refd)***

Kheng Chwee Lian v. Wong Tak Thong [1983] 2 CLJ 191; [1983] CLJ (Rep) 195 FC ***(refd)***

Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties) [2001] 6 CLJ 104 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 73A(1)(b), 101

For the appellant - VK Raj; M/s P Kuppusamy & Co
For the respondent - Nor Azlina; M/s Zaid Ibrahim & Co

Reported by Melinda Robert

JUDGMENT

Hadhariah Syed Ismail JC:

Introduction

[1] The claim in this case arises from a breach of contract of employment. On 25 February 2010, the Sessions Court judge of Kuala Lumpur allowed the respondent's/plaintiff's claim for RM81,660.60 together with interest and costs. The appellant/defendant appealed to this court to reverse the judgment of the Sessions Court.

Brief Facts

[2] The appellant commenced employment with the respondent as senior general manager on 1 August 2006. He received a salary of RM16,000 per month plus other monetary benefits. His services was terminated by the respondent's company three months later *vide* a termination letter dated 10 November 2006 on the ground of misconduct and misrepresentations. Particulars of misrepresentations were pleaded under para. 9(a) to (e) of the statement of claim.

[3] On 18 March 2008, the respondent filed this action against the appellant, claiming for a refund of the following payments made to the appellant for the period he was employed by the respondent from August to November 2006.

(a) Basic pay of RM16,000 for 4 months	- RM	64,000
(b) EPF contribution at 12%	- RM	8,640
(c) Car allowance of RM2,000 for 4 months	- RM	8,000

(d) Handphone bill	- RM	83
(e) Petrol bill	- RM	656.10
(f) Car parking charges	- RM	281.50
Total	- RM	81,660.60

[4] Dissatisfied with his dismissal, the appellant has lodged a complaint of unfair dismissal at the Industrial Relations Department against the respondent which was subsequently referred to the Industrial Court. The case is still pending continued trial.

The Issues

[5] There are two issues before the court.

(a) Whether s. 73A(1)(b) of the Evidence Act 1950 is applicable in admitting the disputed letter from University of Hull.

(b) Whether the respondent's action against the appellant is maintainable under the law as it was essentially a claim for restitution concerning contracts of personal services.

[6] Whether s. 73A(1)(b) Evidence Act 1950 applicable in this case.

[7] Section 73A. Admissibility of documentary evidence in civil cases, etc

(1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:

....

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

[8] It is not disputed that the respondent's claim is based mainly on the allegation that the MBA degree produced by the appellant allegedly said to be issued by University of Hull, England which had induced the respondent to employ the former to the post of General Manager was a forged MBA. Pursuant to s. 101 of the Evidence Act 1950, the burden lies on the respondent to proof the MBA was not genuine. To discharge this burden, the respondent sought to admit a fax letter dated 5 March 2007 from one Jane Evison (Mrs), Assistant Registrar from the University of Hull. For ease of reference I reproduced the letter here.

Lee Tai Yang
Director
Regal Marketing & Trading Sdn Bhd
Taman Sea, Petaling Jaya
Malaysia
Your Fax : 00 603 7880 6691

5.3.07

Dear Mr Lee Tai Yang

Re: Yew Cheng Lim

Thank you for your letter of 21 February 2007.

Unfortunately, I have to advise you that the degree certificate for Yew Cheng Lim cannot be authenticated; it is quite obvious a fraudulent document. The Vice Chancellor's and Registrar's signatures are not correct, the type size and fonts used are incorrect and there was no ceremony held on 9 July 2004.

Furthermore, I regret to inform you that, according to the University's official records, the person named in the certificate, Yew Cheng Lim, has never been awarded an MBA degree in Strategic Marketing by the University of Hull.

Please do not hesitate to contact me if I can be of any further assistance to you.

Yours sincerely,

Jane Evison (Mrs)
Assistant Registrar
Degree Ceremonies Office

[9] The maker of the fax was not called to testify for obvious reason that she was beyond the seas. The respondent sought to admit this fax under s. 73A(1)(b) of the Evidence Act 1950 (the Act) and this was strongly objected to by the appellant. For the fax letter to be admitted in evidence under the said section, the followings element must be satisfied:

(a) that it is not reasonably practicable to secure Mrs Jane Evison's attendance; or

(b) that all reasonable efforts to find her have been made without success.

[10] Having perused the notes of evidence, I agree with learned counsel for the appellant's contention that there was no evidence whatsoever led by the respondent's witnesses that it was not reasonably practicable to secure the attendance of Mrs Jane Evison, nor was there any evidence that all reasonable efforts to find Mrs Evison were made without success. Despite the lack of evidence led by the respondent, the learned trial judge took it upon herself to come to the conclusion that she accepted the disputed letter from Mrs Jane Evison under the proviso of s. 73A(1)(b) because "ini kerana untuk memanggil saksi tersebut dari UK akan melambatkan prosiding dan akan mengakibatkan kos yang tinggi dan kehadiran beliau hanya untuk mengesahkan surat tersebut."

[11] Mr VK Raj, learned counsel for the appellant submits the said letter cannot be admitted under s. 73A(1)(b) of the Evidence Act 1950 because the conditions stipulated under the said section has not been satisfied. To support this contention reference was made to the case of *Jong Set Fah v. Asia Life Assurance Society Ltd* [1996] 2 CLJ 667. In that case a photocopy of a statement certified officials by a doctor was rejected by the court for failure to give reasonable explanations as to why the doctor could not be called as a witness. This is what His Lordship Abdul Kadir Sulaiman J (as he then was) states:

> However, the proviso to s. 73A(1) of the Act allows under certain circumstances Stated therein for the non - calling of the doctor as a witness. The reason given by the learned counsel for the defendant for the absence of the doctor as a witness was firstly because the witness cannot be released by the General Hospital in Singapore. Thirdly, the confidentiality of the patient's information to the doctor. In my view, these are all unacceptable reasons for the purpose of the Proviso to s. 73A(1) of the Act

to excuse the doctor from being called as witness in the proceedings. The mere fact that the doctor cannot be released by the hospital cannot be an excuse for not calling him to be a witness to testify. If proper steps are taken as a witness *subpoena* can be issued to a witness in Singapore to appear in Court in Malaysia to give evidence. On the confidentiality aspect it is for the Court to decide whether certain facts need not be disclosed. In the circumstances, the learned judge had erred in admitting the document under the said section as exhibit D3 for the reason she provided in her judgment. She ought to have rejected the exhibit in the circumstances.

[12] Cik Nor Azlina, learned counsel for the respondent contends the fax letter can be admitted under s. 73A and she relied on the case of *Allied Bank (Malaysia) Sdn Bhd v. Yau Jiok Hua* [2006] 3 CLJ 27; *Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties)* [2001] 6 CLJ 104. It is the respondent's contention that under s. 73A of the Act, the court had a discretionary power to admit the letter.

[13] Analysis of the authorities cited by both parties revealed that whether a statement is admissible or not when the maker is not called is a question of facts to be decided in each particular case. But generally, the court will readily admit such a statement if the circumstances of the case warrant such admission. This must be so in a case where the witness is from overseas and it will cause undue delay and incur high cost to bring the witness to court just to confirm that the MBA degree is not genuine. The evidence to be given by the witness would probably be very short and not commensurate with the time and expenses incurred to bring the witness to Malaysia. I am inclined to adopt the popular view that under s. 73A, the court had a wide discretionary power and although in this case, there was no evidence led by the respondent to satisfy the court that it will cause undue delay or expense to bring the witness, the court took it upon itself that those conditions are satisfied. After all at the end of the day, it is the court who had to decide whether the conditions under s. 73A are satisfied or not. In this case, what the trial judge did was merely applying logic and common sense to the facts presented before her. Her reasoning as to why she chose to admit the letter was within the confine of s. 73A. As she is the trier of facts who had the opportunity to hear and see the witnesses, she is entitled to make the conclusion as she did. Her reasoning also is supported

A by the fact that the appellant himself has failed to produce any document to proof that he had registered with University of Hull, he was offered a place at the university and had made payments to the university. If as he claimed the MBA degree is genuine, he could have easily rebutted the respondent's allegation with the
B production of those documents. But the appellant failed to do so. In those circumstances, I was of the view the sessions judge was right in admitting the fax letter on the grounds stated therein. With the letter from Mrs Jane Evison is admitted, the respondent have discharged the burden of proving the appellant had
C misrepresented to them pertaining to his MBA degree. Therefore the first ground of appeal must fail.

[14] Whether the respondent's action against the appellant is maintainable under the law?

D **[15]** The question posed by the appellant is this. Even if the appellant were to return all the monetary benefits he had earned back to the respondent, how the respondent will restore the benefit of the appellant's services back to the appellant based on the principle of "restitution in integrum."

E **[16]** In response, learned counsel for the respondent argued that since the contract was entered based on wrongful misrepresentation, the agreement becomes voidable. Support for this proposition is found in the Federal Court case of *Kheng Chwee*
F *Lian v. Wong Tak Thong* [1983] 2 CLJ 191; [1983] CLJ (Rep) 195. In that case, the contract for the sale and purchase of land was held voidable on the ground it was entered based on a fraudulent misrepresentation. The effect of such a contract is it becomes voidable at the option of the innocent party and the
G contract can be repudiated.

[17] Applying the principles of law in the above case to the facts of this case, I find there is no merit in the argument advanced by the appellant. Having found the appellant had misrepresented and
H induced the respondent to enter into the contract of employment, clearly the contract becomes voidable at the option of the respondent. Here the respondent has lawfully repudiated the contract. With the repudiation, the respondent is saying they had wrongly paid and the appellant had wrongly received the monetary
I benefits. We are only concerned with the rights of the respondent as the innocent party because the payments would never have

been made to the appellant had the misrepresentation was known to the respondent much earlier. Therefore, I was of the opinion that the principle of restitution in integrum does not apply in this case. It is merely a case of voidable contract and for the return of money had and received and paid wrongfully. For the aforesaid reasons, I find there is no merit in the appellant's contention and it must fail.

[18] To conclude, I find there is no error of law or facts committed by the learned trial judge in coming to her decision. She not only correctly identified the issues, apply the correct law and take into consideration relevant facts, but also come to the correct decision. There is simply no justification for me to interfere with her findings. I therefore dismissed this appeal with costs.